Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DOUG MOCKETT & COMPANY, INC.
Petitioner

v.

ROGER PLUMLEY,
Respondent.

On Petition for Writ of Certiorari
To the Court of Appeal of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment impose any limits on the power of the states to limit the right to civil jury trial?

2. Can a state, consistent with the Fourteenth Amendment due process clause, give its trial courts the power to deny litigants the right to a jury trial on legal causes of action in any case which also includes equitable causes of action?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Doug Mockett & Company, Inc. respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeals for the Second District, filed on May 6, 1997, affirming the decision of the Los Angeles Superior Court herein.

ORDERS BELOW

The May 6, 1997 Court of Appeal opinion is attached hereto as Appendix A. The July 23, 1997 order of the California Supreme Court denying review is attached hereto as Appendix B.

JURISDICTION

The California Supreme Court denied review herein on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), in that Petitioner's claims the protection of the Fourteenth Amendment to the United

States Constitution for the right to trial by jury denied him by the Court of Appeal decision.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

AMENDMENT XIV, SECTION 1

> No State shall ... deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On December 3, 1993, Doug Mockett & Company, Inc. (hereinafter, Petitioner) filed its complaint against Roger Plumley (hereinafter Respondent) for breach of confidence, breach of implied contract, misappropriation of trade secret

and unfair competition (JA 1, *et seq.*). Respondent answered on January 7, 1994 (JA 15, *et seq.*).

Petitioner filed its first amended complaint, adding a cause of action for express contract, on July 15, 1994 (JA 82, *et seq.*).

On March 23, 1995, Respondent filed his Motion in Limine re: 1) Scope of Trade Secret Claims, and 2) Scope of Damage Evidence at Trial, contending, among other things, that Petitioner had no right to a jury trial on its statutory unfair competition claim.

On May 12, 1995, the trial court decided that the legal and equitable issues would be tried simultaneously to the jury and the court (RT A-21).

The trial began with jury selection on June 26, 1995 (Minute Order of June 23, 1995, JA 874).

On July 5, 1995, the trial court instructed the jury on the causes of action for breach of confidence, implied contract, misappropriation of trade secret and express contract (Minute Order of July 5, 1995 [JA 947]; Instructions Given, filed on July 10, 1995 [JA 954]).

On July 10, 1995 the jury informed the court that they were unable to come to a decision, and the court declared a mistrial (Minute Order of July 10, 1995 [JA 972]).

On July 19, 1995 Respondent filed his Motion 1) Seeking Decision on Submitted Matter; and 2) Entry of Judgment under C.C.P. Section 630(f) (JA 973, *et seq.*). On July 27, 1995, the trial court granted the motion to the extent of rendering a ruling on the equitable issues in favor of Respondent (JA 1009).

On August 7, 1995 Respondent requested a statement of decision (JA 1019). On August 14, 1995, the trial court filed its statement of decision deciding all legal as well as equitable causes of action (JA 1024). On August 21, 1995, the trial court reissued its statement of decision after having considered Petitioner's opposition to Respondent's request (JA 1043).

On September 11, 1995, Respondent filed his motion for attorney's fees (JA 1045, *et seq.*).

On September 21, 1995, Respondent gave notice of entry of judgment (JA 1542). On November 7, 1995, Petitioner filed a motion to set aside the judgment (JA 1704).

On November 9, 1995, the trial court denied Petitioner's motion to set aside the judgment, and granted Petitioner's motion to tax costs in part (JA 1730).

On November 20, 1995, Petitioner filed timely notice of appeal from the judgment (JA 1732).

On March 1, 1996, the trial court approved the report in its entirety and entered an award of attorney's fees in the amount of $396,674.35 (Minute Order of March 1, 1996, JA 1776).

On March 8, 1996 Petitioner filed a notice of intention to move for a new trial on the attorney's fees award (JA 1799). On April 3, 1996, the trial court denied Petitioner's motion to set aside the report, and granted the motion for new trial to the extent of reconsidering the referee's report and award of jury's fees and again approving the report and making the award in the amount of $396,674.35 (Minute Order of April 3, 1996, JA 1908).

In the pleadings filed in the trial court, Petitioner claimed the right to jury trial on his legal causes of action both under the California and the United States Constitution (JA 992-97, 1565-66)

On April 26, 1996, Petitioner filed timely notice of appeal from the award of attorney's fees (JA 1914).

On August 12, 1996, this Court granted Petitioner's motion to consolidate the two appeals (JA 1918).

On May 6, 1997 the Court of Appeal filed its opinion denying Petitioner's claim of the right to a jury trial on his legal causes of action, and affirming the judgment. On

July 23, 1997 the California Supreme Court denied Petitioner's petition for review.

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER THE DUE PROCESS IMPOSES ANY LIMITS ON THE POWER OF THE STATES TO DEPRIVE LITIGANTS OF THE RIGHT TO JURY TRIAL IN CIVIL MATTERS.

This Court has until now refused to extend the right to civil jury trial to state courts under the due process clause of the Fourteenth Amendment. See *Hardware Dealers Mutual Fire Insurance Co. v. Glidden, Co*, 284 U.S. 151, 158 (1931); *Colgrove v. Battin*, 413 U.S. 149, 169, footnote 4 (Marshall, dissenting, 1973).

This Court has also long held, however, that the right to civil jury trial is "a fundamental guarantee of the rights and liberties of the people." *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 at 377-378 (1913), quoting *Parson v. Bedford*, 3 Pet. 433 at 446 (Story, J., 1830). And, as due process has been held to embody the principles "so

rooted in the tradition and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319 at 325 (1937), this Court's long-standing recognition of the "fundamental" status of the right to civil jury justifies a reconsideration of its status under the due process clause. Further, this Court has "recently reinvigorated the seventh amendment's right to trial by jury by expanding its coverage to a variety of statutory causes of action giving to money damages." *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am.U.L. Rev. 727 at 731; see, e.g, *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), *Tull v. United States*, 481 U.S. 412 (1987). There is particularly good reason, therefore, for this Court to consider the application of this newly "reinvigorated" right to the states at this time.

A decision that some central aspects of this "fundamental guarantee of the rights and liberties of the people" should be applicable to the states would not require that the states be put into "a constitutional straitjacket with respect to their own development in the administration of ... civil law." *Duncan v. Louisiana*, 391 U.S. 145 at 175 (Harlan, J. dissenting 1968). This Court has held that, even

on the federal level, the Seventh Amendment was "designed to preserve the basic institution of jury trial only in its most fundamental elements, not the great mass of procedural forms and details..." *Galloway v. United States*, 319 U.S. 372 at 392 (1943). The question, therefore, is not whether the entire Federal jurisprudence of civil jury trial should be applied to the states, but only whether some of the most crucial aspects of the right to civil jury trial should be protected against abrogation by the states.

The particular aspect of the right to jury trial which Petitioner was denied here has been held by this Court to have that kind of crucial importance: the right not to jury trial of legal causes of action preempted by the court's decision of equitable causes of action which may also be present in the case. This Court has held that where legal and equitable causes of action are joined in a single lawsuit, the trial court must exercise its discretion, "whenever possible, ... to preserve jury trial." Thus,

> only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 at 510-11 (1959), quoted at *Lytle v. Household Mfg. Inc.*, 494 U.S. at 550, *supra.*

The position taken by the California Court of Appeal here was diametrically opposed to that which this Court took in *Beacon Theatres* and recently reaffirmed in *Lytle*. Rather than directing the trial courts to exercise discretion in favor of the right to trial by jury whenever possible, the California court held that trial judges may properly exercise their discretion to preempt the right to jury trial on legal issues at will in any case involving equitable issues by deciding the equitable issues first (Appendix A., pp. A8-13.)

The Court of Appeal accomplished this by giving the broadest possible reading to the "equity first" doctrine, the doctrine that "in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury (or ... with an advisory jury), and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671.

Petitioner did not deny the existence of the "equity first" doctrine in California law in the court below, but

argued that respect for the "inviolate" Constitutional right to jury trial, California Constitution, Article I, section 16, required the discretion to try equitable causes of action be limited to cases in which the "gist" of the entire action is equitable rather than legal (AOB 13-14). The Court of Appeal rejected that argument and insisted that discretion to preempt a trial by jury through the trial of equitable issues first is present in *every* case in which equitable issues are intermixed with legal, whether their overall gist is legal or equitable. The result is a total negation of the principles of *Beacon Theatres*.

As demonstrated by the instant case, this broad reading of the trial court's power to abrogate the right to jury trial has a special significance for intellectual property litigation. Virtually all intellectual property plaintiffs seek both legal and equitable relief, which means that parties to intellectual property actions in California have no enforceable right to trial by jury. The question presented here is whether a system which grants intellectual property litigants in Federal court the protection of the *Beacon Theatres* doctrine for their fundamental right to trial by jury while leaving those who litigate over intellectual property rights in state courts at the mercy of doctrines like California's "equity first" rule

comports with the due process clause's demand for fundamental fairness.

This Court should grant review here in order to consider whether such denials of protection for the most fundamental aspects of an institution which it has held to be "a fundamental guarantee of the rights and liberties of the people" are consistent with due process of law. It is time to reexamine the question of whether the most basic constituents of the federal right to civil jury trial are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. at 325, *supra*, as Justice Story long ago implied, and this case offers an excellent opportunity for doing so.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant its writ of certiorari herein.

Respectfully submitted,

Robert S. Gerstein
Attorney for Petitioner
DOUG MOCKETT &
COMPANY, INC.

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DOUG MOCKETT & COMPANY, INC.	) B098541,
	) B101969
Plaintiff and Appellant,	)
	) Sup.Ct.No.
v.	) BC094386
	)
ROGER PLUMLEY et al.,	)
	)
Defendants and Respondents.	)
	)

APPEALS from judgment and order of the Superior Court of Los Angeles County, Florence-Marie Cooper, Judge. Affirmed.

Robert S. Gerstein, Stall, Astor & Goldstein and Sanford Astor for Plaintiff and Appellant.

Arant, Kleinberg, Lerner & Ram, Marshall A. Lerner, Bradford E. Mattes, Hill, Farer & Burrill, Neil D. Martin and Dean E. Dennis for Defendants and Respondents.

Appellant Doug Mockett & Company sued respondent Roger Plumley, individually, and doing business as Functional Hardware and Display Products (hereafter "Plumley"). Appellant's equitable and legal claims, respectively, were tried simultaneously to the trial court and a jury. After the jury failed to reach a verdict, the trial court made findings on appellant's equitable claims that also resolved its legal claims, and entered judgment in Plumley's favor. Appellant appealed from this judgment and from a subsequent award of attorneys fees. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Douglas Mockett (hereafter "Mockett") owns appellant, a firm that designs and markets grommets, that is, devices that channel electrical wiring in desks, as well as other

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[1]Following established principles of appellate review, the facts are recited here in the light most favorable to the judgment. *(Buehler v. Sbardellati (1995)* 34 Cal.App.4th 1527, 153 1, fn. 1.)

furniture components. Between 1983 and 1989, Inland Plastics made appellant's plastic grommets. In 1989, Mockett switched production to Jet Plastics. Plumley was an independent sales representative for Jet Plastics who dealt with Mockett.

In January 1991, Mockett and Jet Plastics ended their relationship. Shortly thereafter, Plumley developed a new form of grommet. The key feature of this grommet was a hinged tab that hid the wire hole when no wires ran through the grommet, but folded out of sight within the grommet when wires were present. Plumley first advertised his new grommet in October 1991 under the dba Functional Hardware, and later marketed it under the dba Display Products.

Appellant initiated this action against Plumley in December 1993, alleging that Plumley had misappropriated the idea for the new grommet from Mockett, who had communicated it to Plumley in confidence. On July 15, 1994, appellant filed a first amended complaint for breach of implied and express contract, breach of confidence, statutory and common law misappropriation of a trade secret, and statutory and common law unfair competition. Appellant

sought damages under all claims, and an injunction under the claims for breach of confidence and unfair competition.

On March 23, 1995, Plumley filed a motion in limine, contending, inter alia, that appellant did not have a right to a jury trial on its statutory unfair competition claim under Business and Professions Code section 17200 et seq. Appellant conceded that this claim was equitable, and requested that the jury render advisory findings on this claim. Pursuant to this request, the trial court ultimately ruled that appellant's legal and equitable claims, respectively, would be tried simultaneously to the jury and the trial court. The trial court concluded that appellant's statutory and common law unfair competition claims were both equitable in nature, but declined to receive advisory findings from the jury on these equitable claims.

Trial began on June 23, 1995. Appellant presented evidence in support of the following account of the new grommet's origins: Mockett had Plumley sign a confidentiality agreement in September 1989. In June 1990, Mockett thought of the basic idea for the new grommet while at a trade show in Chicago, and he communicated it to Plumley in the course of Mockett's relationship with Jet Plastics. Mockett's problems with Jet Plastics interrupted his

development of the idea until August 1991. Mockett first noticed Functional Hardware's advertisement for the new grommet in February 1992, and he soon learned that Plumley was responsible for the advertisement.

At the end of appellant's case-in-chief, Plumley moved for nonsuit on the issue of damages because appellant had no evidence of damages to offer other than a stipulation concerning Plumley's gross sales of grommets. To avoid a ruling on the motion, appellant stipulated that the trial court would be the trier of fact with respect to damages.

Plumley's defense case disputed appellant's account of the new grommet's origins. He presented testimony and evidence that he never signed the 1989 confidentiality agreement, that the signature thereupon was not genuine, that Mockett never communicated the idea for a new grommet to him, that he discovered the idea independently in January 199 1, and that Mockett could have obtained the idea from Plumley's advertisements as early as October 1991.

After the jury was unable to return a verdict on the legal issues submitted to it, the trial court declared a mistrial on July 10, 1995. The trial court concluded that it could nonetheless render a decision on the unfair competition

claims, and it ultimately issued a statement of decision on August 21, 1995.

The trial court found that Plumley's signature on the 1989 confidentiality agreement was a forgery, that Mockett never communicated the idea for the new grommet to Plumley, that Plumley invented the new grommet, that Mockett had obtained the idea for the grommet from Plumley's advertising, and that appellant had no legal damages. On the basis of these findings, the trial court concluded that there were no unresolved jury issues, and it ruled in favor of Plumley on all of appellant's claims. Judgment was entered on September 21, 1995.

On November 27, 1995, the trial court granted Plumley's request for attorney fees, and assigned the determination of the amount of the award to a referee. The referee filed his report on March 1, 1996. On the same date, the trial court approved this report and awarded Plumley $396,674.35 in attorney fees. Mockett filed motions to set aside the report and for a new trial on the fee award. The trial court denied the motion to set aside the report, but granted the motion for a new trial to the extent of reconsidering the report. Upon reconsideration, the trial court again approved the fee award.

Mockett's appeals from the judgment and the fee award were subsequently consolidated.

DISCUSSION

Appellant contends that (1) the trial court denied its right to a jury trial, (2) substantial evidence does not support the trial court's finding that appellant had no legal damages, (3) the trial court failed to limit the attorney fee award to those fees connected with Plumley's defense against appellant's statutory misappropriation of trade secrets claim, and (4) the fee award includes an improper item.

A. Right To Jury Trial

Appellant contends that the trial court improperly foreclosed its right to a jury trial on the legal issues of liability by making findings on the equitable issues that also resolved appellant's legal claims. We disagree.

The doctrines relevant to the issue raised here are well established. "The right to a jury trial is guaranteed by our Constitution. (Cal. Const., art. 1, § 16.) We have long acknowledged that the right so guaranteed, however, is the right as it existed at common law in 1850, when the Constitution was first adopted, 'and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact.' [Citations.] As a general proposition, '[T]he jury trial is a matter of right in a civil action at law, but not in equity.' [Citations.]" (C & K *Engineering Contractors v. Amber Steel Co.* (1 978) 23 Cal.3d 1,, 8.) Furthermore, "if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause. [Citation.]" (*Connell v. Bowes* (1942) 19 Cal.2d 870, 871.) Nonetheless, "in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury (or ... with an advisory

jury), and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury. [Citations.]" *(Raedeke v. Gibraltar Sav. & Loan Assn.* (1974)10 Cal.3d 665, 671.)

An instructive application of these doctrines is found in *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11. *In Golden West, the* plaintiff sued the City of Anaheim for specific performance, injunctive relief, and a quieting of title with respect to a lease interest in a parking lot, and for tortious interference with contractual relations. (25 Cal.App.4th at pp. 20-21.) The trial court decided to adjudicate the plaintiff's equitable claims first, and severed the tortious interference claim for a later jury trial. (*Id.* at p. 21.) Following the bench trial, the trial court made findings that obviated the need for the jury trial, and the trial court entered judgment on the tortious interference claim against the plaintiff. *(Ibid.) The Golden West* court affirmed, reasoning that "[w]here a case involved both equitable and legal causes of action, the trial court may bifurcate the case to try the equitable issues first, because resolution of the equitable issues may eliminate the need for a trial of the legal causes of action. [Citations.]" (*Id.* at p. 50.)

Here, appellant's common law and statutory unfair competition claims sound in equity (see *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263 [common law tort]; *United Farm Workers of America v. Superior Court* (1975) 47 Cal.App.3d 334, 344, disapproved on another point in *Bank of the West v. Superior Court, supra*, 2 Cal.4th 1254 [statutory tort]), and appellant conceded to the trial court that its statutory claim was equitable. The trial court, exercising its discretion, declined to receive advisory findings from the jury on the equitable claims. The jury's failure to return a verdict on the legal issues did not remove these equitable claims from the trial court's jurisdiction. *(See Distefanov. Hall* (1963) 218 Cal.App.2d 657, 662, fn. *7; Farrell v. City of Ontario (*1919) 39 Cal.App. 351, 359.) Because "[a] mistrial is the equivalent of no trial" (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 163, p. 162), there had effectively been no jury trial when the trial court issued its findings on the equitable claims. In view of these findings, the trial court properly determined that the jury had nothing to resolve concerning the legal claims, which, as appellant concedes, rest on the same theory as its unfair competition claims, namely, that Plumley misappropriated the idea for the new grommet that Mockett communicated

to Plumley in confidence. *(See County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 866 ["A judgment cannot be premised on different answers to identical material questions. [Citation.]"].)

Appellant contends that (1) the "equity first" rule governs cases involving legal and equitable issue s only when the "gist" of the *entire* action is equitable, citing principally C *& K Engineering Contractors v. Amber Steel Co., supra,* 23 Cal.3d 1, *Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, *Arciero Ranches v. Meza (*1993) 17 Cal.App.4th 114, and *Frahm v. Briggs (*1 970) 12 Cal.App.3d 441, and (2) the "gist" of its entire action against Plumley is legal. We are not persuaded.

C & K Engineering, Paularena, Arciero Ranches, and Frahm do not support the proposition appellant advances. In *C & K Engineering,* our Supreme Court stated that: "In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case -- *the gist of* the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.'" [Citation.]" (C *& K Engineering Contractors v. Amber Steel Co., supra,*

23 Cal.3d at p. 9.) Applying this test, the court concluded that the trial court properly denied the plaintiff s request for a jury on its breach of contract claim because it was entirely predicated on the equitable doctrine of promissory estoppel. (See *id.* at pp. 911.) Unlike the present case, *C & K Engineering* did not involve a suit with distinct equitable and legal claims.

In Paularena, the plaintiffs alleged several causes of action concerning land sales contracts, including a cause of action for rescission. *(Paularena v. Superior Court, supra,* 231 Cal.App.2d at p. 909.) The trial court ruled that, on the facts of the case, the plaintiffs' only viable cause of action was for rescission, and that the plaintiffs were not entitled to a jury trial on this claim because it was equitable in nature. (Id. at pp. 910-911.) *The Paularena* court agreed that the rescission claim was the plaintiffs' sole viable cause of action, but ruled that the plaintiffs were entitled to a jury trial because the gist of this claim was legal. (See *id.* at pp. 914-916.) Thus, unlike the present case, the trial court in *Paularena* erroneously classified the claim upon which it intended to rule as equitable.

Finally, *Arciero Ranches* and *Frahm* present essentially the same factual situations. In both cases, parties predicated

a claim or claims on the allegation that other parties had interfered with a prescriptive easement, and the trial court determined that the issue of the easement's existence was equitable. *(Arciero Ranches v. Meza, supra,* 17 Cal.App.4th at pp. 116-117; *Frahm v. Briggs, supra,* 12 Cal.App.3d at pp. 442-443.) Again, in both cases, the reviewing court reversed because this issue is legal. *(Arciero Ranches v. Meza, supra,* at p. 125; *Frahm v. Briggs, supra,* at pp. 445-446.) Thus, unlike the present case, the trial courts in *Arciero Ranches and Frahm* erroneously determined that the dispositive issue or right of action by which it resolved the defendants' claims fell within its equitable jurisdiction.

In our view, *C & K Engineering, Paularena, Arciero Ranches and Frahm* stand for the proposition that in cases involving equitable and legal issues or rights of action, a trial court may not adjudicate issues or rights of action within its equity jurisdiction where the gist of the claim is not equitable. However, in such cases, the trial court may first resolve the issues or rights of action where the gist of the claim is equitable, and in so doing, foreclose a jury trial on the remaining legal issues or rights of action. (See *Golden West Baseball Co. v. City of Anaheim, supra,* 25 Cal.App.4th at pp. 50-5 *1; Strauss v. Summerhays* (1984)

157 Cal.App.3d 806, 811-812 [in consolidated case involving will contest and cross-actions for quiet title, trial court properly dismissed will contest, a legal action, without jury trial after resolving equitable claims for quiet title]; *Jaffe v. Albertson Co.* (1966) 243 Cal.App.2d 592, 598-610 [trial court properly entered judgment on plaintiff s legal claim for contract damages without jury trial after finding that contract does not exist in resolving coplaintiff s equitable claim for specific performance]; *Peterson v. Peterson* (1946) 74 Cal.App.2d 312, 320-322 [trial court's ruling on equitable claim for quiet title extinguished need for' jury trial on legal claim for fraud].)

Accordingly, we focus our analysis on appellant's claims of unfair competition. As we have explained, these claims were properly within the trial court's equitable jurisdiction. Moreover, because appellant conceded to the trial court that its claim for statutory unfair competition was equitable, it may not contend otherwise on appeal. (See *Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal.App.3d 243, 259.)

Appellant also contends that the trial court's decision to rule on the equitable claims after the jury failed to reach a verdict prejudiced appellant's right to dismiss its equitable

claims before trial, citing *Raedeke v. Gibraltar Sav. & Loan Assn., supra, 10* Cal.3d 665. In *Raedeke*, the plaintiffs elected to waive an equitable contention when the trial court announced its intention to "'proceed with the equitable issues.'" (*Id.* at p. 671.) The *Raedeke* court observed that "[c]learly, plaintiffs' counsel appreciated the substantial risk that if the court tried the equitable' issues first, plaintiffs might forfeit their right to a jury trial altogether." *(Ibid.)*

By contrast with the situation in *Raedeke*, appellant's counsel conceded that the trial court should hear the statutory unfair competition claim, prompted the court to order a simultaneous trial of the equitable and legal claims by requesting advisory findings from the jury on the equitable issues, did not object to the simultaneous trial as ordered, and did not request leave to dismiss the equitable claims when the trial court indicated its intent to rule despite the jury mistrial. Appellant thus invited the order of proof adopted by the trial court, and accepted the risk that the trial court might render dispositive findings in the event of a jury mistrial.

In sum, appellant was not denied its right to a jury on the legal issues of liability.[2]

B. Apportionment of Attorney Fees

Appellant contends that the trial court erred in failing to limit the award of attorney fees to those fees properly connected with Plumley's defense against appellant's statutory misappropriation of trade secrets claim. Civil Code section 3426.4 authorizes the trial court to award reasonable attorney fees when a statutory misappropriation claim is made in bad faith, and Code of Civil Procedure section 1033.5 permits the trial court to award such fees as costs. (See Code Civ. Proc., § 1033.5, subds. (c)(3), (c)(5).)

In the present case, the trial court awarded attorney fees pursuant to these provisions, concluding that appellant's statutory misappropriation claim was brought in bad faith because "the documents offered in evidence by [Mockett] in

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[2]Because the trial court's findings about the origin of the new grommet are sufficient to support the judgment, we do not address appellant's other contentions concerning the statement of decision, namely, that (1) substantial evidence does not support the finding that there were no legal damages, and (2) the trial court erred in stating that it would have had the authority to set aside the jury's findings even if the jury had rendered special verdicts inconsistent with the trial court's findings.

support of his claim were forged or back-dated by him." The trial court then appointed retired Judge Richard Amerian to determine the amount of the award. Judge Amerian concluded that the fees awarded should not be limited to those associated with the statutory misappropriation claim because appellant's causes of action rested on "a core factual similarity," citing *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486. The trial court adopted Judge Amerian's report and recommendations.

"It is axiomatic that the determination of what constitutes reasonable attorney fees is a matter vested in the sound discretion of the trial court. [Citation.] The trial court has both the expertise to decide this matter [citation] and the unique ability to value the services rendered in a matter litigated before it [citation].". *(Cortez v. Bootsma* (1994) 27 Cal.App.4th 935, 938.) With respect to awards of fees in cases involving several causes of action, our Supreme Court stated in *Reynold Metals Co. v.,Alperson* (1979) 25 Cal.3d 124: "A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper.... Conversely.... [a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a

cause of action in which fees are proper and one in which they are not allowed." (*Id.* at pp. 129-130.)

Appellant's key contention is that the trial court erred in relying on the common core of facts" test in *Drouin (see Drouin v. Fleetwood Enterprises, supra,* 163 Cal.App.3d at p. 493), which is at odds with the test stated in Reynolds Metals. Appellant argues that although its causes of action may rest on a common set of facts, some of its causes of action involve factual issues that do not touch the statutory misappropriation action. In this regard, appellant's sole example is the existence of the confidential agreement, which appellant maintains is relevant to its claim for breach of express contract, but not relevant to its statutory misappropriation claim.

We begin by observing that with respect to a discretionary ruling, "[w]e are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]" *(In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) Here, appellant's opening brief concedes that its causes of action hinge on a single theory of wrongful conduct, namely, that Plumley misappropriated the idea for the new grommet that Mockett

confided to Plumley in the course of Mockett's dealings with Jet Plastics.

Furthermore, appellant has failed to demonstrate the existence of an issue that is not pertinent to the statutory misappropriation claim. Whether Plumley signed the confidentiality agreement is material to the statutory misappropriation claim in two ways. First, a confidentiality agreement is evidence that the party claiming misappropriation of a trade secret took reasonable steps to safeguard the purported secret. (See *AMI Systems Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 521 [interpreting California law].) Second, the crux of Plumley's defense at trial against all of appellant's claims was that Plumley originated the new grommet, and that Mockett fabricated a number of documents to show otherwise. Mockett's credibility was thus a central issue at trial, and the genuineness of Plumley's signature on the confidentiality agreement was a focal point of this issue. As we have explained, the trial court decided to award attorney fees under the provisions governing statutory misappropriation claims because it concluded that Mockett had fabricated or altered the documents upon which he rested his case,

including the confidentiality agreement, and appellant has not challenged this decision on appeal.

In these circumstances, we cannot conclude that the trial court abused its discretion with respect to the apportionment of attorney fees.

C. Failure To Strike Fees Incurred For Discovery Demand

Appellant also contends that the trial court abused its discretion by including within the attorney fee award certain fees incurred on a discovery request that the discovery referee had deemed unjustified. Plumley sought $13,922 in fees arising from a discovery request for the production of the originals of five documents upon which appellant rested its case. The trial court adopted Judge Amerian's recommendation on this matter and granted the fees associated with this discovery request.

The record discloses the following facts about this request: During the discovery period, Plumley presented a motion to the discovery referee, retired Judge Phillip M. Saeta, seeking sanctions and an order to compel production of the originals of the five documents. At the same time, Plumley sought these original documents in an action

Mockett had initiated before the federal Board of Patent Appeals and Interferences. Plumley argued to Judge Saeta that although appellant had allowed Plumley's expert to inspect the originals at Mockett's business, the expert had been unable to conduct certain tests without nonportable equipment located in the expert's office. Appellant opposed and requested sanctions, contending, inter alia, that Plumley had failed to describe the proposed tests with the specificity required by Code of Civil Procedure section 203 1, subdivision (c)(4).[3]

Shortly before Judge Saeta heard the matter, Plumley obtained an order compelling production of the original documents in the patent action, mooting his discovery request in the present action. At the hearing, Plumley's counsel explained to Judge Saeta that they had failed to specify the needed tests for fear that Mockett would tamper with the documents, but they declined to state precisely how Mockett could defeat the tests. Judge Saeta recommended

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[3]This subdivision provides that a party demanding an inspection shall "[s]pecify any related activity that is being demanded in addition to an inspection and copying, as well as the manner in which that related activity will be performed, and whether that activity will permanently alter or destroy the item involved." (Code Civ. Proc., § 203 1, subd. (c)(4).)

that Plumley be sanctioned, citing his document request in the patent action and his failure to comply with section 203 1. The trial court adopted Judge Saeta's report and awarded appellant $600 in sanctions.

At trial, Plumley's expert testified that he scanned the original documents for physical indentations or impressions, and determined that one document, dated March 1991, was inscribed with a phone number with an area code that was not effective until 1993, raising the inference that the document was created no earlier than 1993. Judge Amerian later concluded that Plumley was entitled to fees incurred in connection with the discovery request in question for the following reasons: "It was necessary and appropriate to seek the documents in both fora. Failing to disclose exactly what test would be performed by the expert ... was vital here, to preserving the integrity of the documents and ensuring that the test would mean something. Had the nature of the test been disclosed, it could have been defeated by ironing and flattening the document."

In view of the trial court's finding that Mockett had fabricated or altered documents, as well as the evidence available when the trial court ruled on the fee award, we do not discern an error. The trial court could have properly

concluded that Plumley's counsel, in framing their production request and seeking the originals in two actions, reasonably believed that obtaining intact originals was an urgent matter, and that disclosing more than minimal information about the proposed tests endangered the integrity of the originals. There was no abuse of discretion.

DISPOSITION

The judgment and award of attorney fees are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BARON, J.

We concur:

HASTINGS, Acting P.J.

ARANDA, J.*

*Assigned by the Chairperson of the Judicial Council.

APPENDIX B

APPENDIX B

Second Appellate District, Division Four,
No. B098541/B101969
S062146

IN THE SUPREME COURT OF CALIFORNIA

DOUG MOCKETT & COMPANY, Appellant

v.

ROGER PLUMLEY Et al., Respondents
And Companion Case

Appellant's petition for review DENIED.

/s/_____
Chief Justice

Supreme Court, U.S.
FILED
OCT 21 1997
CLERK

No. 97-508

In The

Supreme Court of the United States

October Term, 1997

DOUG MOCKETT & COMPANY, INC.,

Petitioner,

vs.

ROGER PLUMLEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ABSENCE OF JURISDICTION

This is a state law unfair competition and trade secret misappropriation dispute over who invented a new kind of plastic grommet. The unpublished decision below, from California's intermediate Court of Appeals, was based on issues of state law procedure and waiver. It involved how a court should proceed on exclusively state law claims when both legal and equitable claims are pleaded and tried concurrently. Here the Petitioner (Mockett) agreed to the procedure the trial court employed so there is the additional issue of Mockett having waived any objection. All of the state court litigation was focused on the state law issues of:

- Whether, under the California Constitution (Cal. Const., art. 1, sec. 16) the trial court improperly foreclosed Mockett's right to jury trial on the legal issues of liability by also making findings on the equitable issues that resolved Mockett's legal claims; and

- Whether Mockett could complain since "he invited the order of proof adopted by the trial court, and accepted the risk that the trial court might render dispositive findings in the event of a jury mistrial." (Pet., App. A, p. 15)

Below, Mockett urged that when legal and equitable claims are, by mutual agreement, tried concurrently to a jury and a court respectively, and the jury deadlocks on the legal claims, the court may not decide the equitable claims adverse to Mockett but must instead defer the equitable claims and order a new trial on the legal claims. He claimed that, under California law, where the "gist" of

the case is legal, the trial court may not decide equitable claims concurrently presented to it. Respondent (Plumley) countered that, under California law, where the plaintiff pleaded distinct legal and equitable claims and agreed to have them tried concurrently there is no deprivation of a jury trial if the court separately decides the equitable claims even though a jury deadlocks on the legal claims. Moreover, if resolution of the equitable claims and legal claims turned on the same facts, as Mockett agreed was the case here, then resolution of the equitable claims would also dispose of the legal claims as no factual issues remained to be decided.

The three-judge California Court of Appeal unanimously held that well-settled rules of state procedure permit exactly what occurred and do not deprive Mockett of a right to jury trial under the California Constitution. (Pet., App. A, pp. 8-15) It also determined that Mockett waived any objection to the process by "inviting the order of proof adopted by the trial court." (Pet., App. A, p. 15) The appellate court therefore upheld specific findings by the trial court that Mockett lied about inventing the grommet, that Mockett forged documents to support his claim, that Mockett knowingly brought this case in bad faith, and that Mockett had no legal damages in any event. (Pet., App. A, pp. 6, 16-17) All as a matter of California law. All without any party raising any issues of federal law. All without any party even citing any provision of the United States Constitution. The California Supreme Court declined to exercise its discretionary review of the Court of Appeal decision.

The Seventh Amendment, which Mockett uses as his jurisdictional entree, played absolutely no part in this case.

- A substantial federal question was neither raised, presented nor pursued in the state court proceedings.
- The decision below was alternatively based on the separate, adequate and independent ground that Mockett "invited the order of proof" and waived any objection.

It would thus appear that this Court has no jurisdiction to review the state court determinations of state law issues. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965). We have included a more extended jurisdiction discussion *infra*.

STATEMENT OF THE CASE

The facts of this case are well set forth in the decision of the California Court of Appeal attached as Appendix A to the Petition.

REASONS FOR DENIAL OF THE PETITION

I

This Court's Jurisdiction Is Properly Reserved For Cases Raising Significant Federal Questions

There are good reasons why this Court abjures cases based on state law. One of them is jurisdictional: this Court does not sit as a court of error to review state court

decisions of state law. Another reason recognizes that when federal questions are not raised in the state court the record is very likely to be inadequate since it was not compiled with a federal question in mind. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). And finally, even if a federal question is raised below, review by this Court is unnecessary if the state court decision is supported by an adequate and independent state ground. *Id.* For the jurisdiction of the Supreme Court to be invoked under 28 U.S.C. § 1257, it is essential that a substantial federal question be raised, presented, and pursued in a timely and proper manner in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962). A federal claim must *either* be raised in the state court *or* considered and resolved by the state court, before it can be considered by this Court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971).

A

Federal Constitutional Provisions Were Neither Raised, Briefed Nor Discussed By The California Courts Or Petitioner

The party seeking certiorari has the burden to demonstrate this Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942). The petition must specify when the federal question was first raised, the manner in which it was raised, and the decision made by the state court as to the federal question, along with supporting citations to the record. *Supreme Court Rules*, Rule 14.1(g)(I) (1995 Revised). Mockett has not done that.

First, no constitutional issue was decided below. The opinion of the California Court of Appeal does not even mention the United States Constitution or any federal law. The decision deals exclusively with state law. (Pet., App A)

Second, no federal issue was raised below. When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in the Supreme Court can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576, 582 (1969).

The Petition's reliance on the Seventh Amendment marks the first mention of that provision in the appellate briefing of this case. Attached as Appendices 1 through 4 are the tables of authorities from the briefs filed by Mockett in the California appellate courts, including the Petition for Rehearing in the Court of Appeal and the Petition for Review to the California Supreme Court (where, at the very least, one would have expected the supposed Seventh Amendment issue to have been raised). Instead, Mockett's arguments at all stages have been targeted wholly on state law procedural issues.

Even in his Statement of the Case to this Court, Mockett makes only one reference to any federal law raised below, stating:

> "[i]n the pleadings filed in the trial court, Petitioner claimed the right to jury trial on his legal causes of action both under the California and United States Constitution. (JA 992-997, 1565-66)" (Pet., p. 5)

But in the first of these two references to the record, there is no discussion or citation of the United States Constitution or any federal law. JA 992-997. And while pages JA 1565-66 do cite two federal cases, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen Inc. v. Wood*, 369 U.S. 469 (1962), there is no reference to the Seventh Amendment. Moreover, the reference to those two cases was part of an ancillary pleading Mockett filed in the trial court in opposition to Plumey's post-judgment Motion for Attorneys' Fees. Mockett was there arguing, by analogy, the hypothetical implications of the trial court's decision if applied to federal anti-trust law. He was not asserting that the Seventh Amendment or any federal law guaranteed him an absolute right to jury trial. Mockett did not repeat this argument in any of the appellate proceedings. The mere reference by analogy to federal law in opposition to an attorneys' fees application below does not create a substantial federal question or confer upon this Court jurisdiction over state law issues.

The Petition is too late to raise the necessary federal question for jurisdiction. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). It is the state court record that must affirmatively show that the Petitioner raised the federal issue. And the Petition is not part of the state court record, and thus it cannot be relied upon to confer the requisite jurisdiction. *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929).

California law was the beginning and the end of Mockett's arguments below. And that should be the end of this case.

B

Mockett's Waiver Created An Independent Ground For Affirmance

When a state court decides a case solely on either a state law issue or an alternative state law issue, this Court has no jurisdiction to review that decision as long as the state law determination is adequate and independent of the federal issue. *Broad R.P. Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-41 (1930); *Michigan v. Long*, 463 U.S. 1032, 1037 (1983).

Here the nonfederal grounds are not merely the "adequate and independent" thing, they are the only thing. But even if we assume, *arguendo*, that the Seventh Amendment issue was raised and considered in the state court proceedings, the Court of Appeal decision clearly and expressly states a bona fide and independent state ground for affirming the trial court. Where that is true, this Court "will not undertake to review the decision." *Id.* at 1041.

In reaching its decision, the state appellate court found that, irrespective of any right to a jury trial Mockett may have had, he agreed to the procedure adopted by the trial court:

> "[Mockett's] counsel conceded that the trial court should hear the statutory unfair competition claim, prompted the court to order a simultaneous trial of the equitable and legal claims by requesting advisory findings from the jury on the equitable issues, did not object to the simultaneous trial as ordered, and did not request leave to dismiss the equitable claims when the trial court indicated its intent to rule despite the

> jury mistrial. Appellant thus invited the order of proof adopted by the trial court, and accepted the risk that the trial court might render dispositive findings in the event of a jury mistrial." (Pet., App. A, p. 15)

The state court's finding of waiver does not rest on any federal law and it is an independent ground for the state court's decision.

II

There Is No Reason to Upset This Court's Prior Rulings

Even putting aside these insurmountable jurisdictional defects, another reason for denying the Petition is that it asks the Court to overturn decades of precedent with no justification. Whether the Seventh Amendment right to a jury trial should be applied to the states through the Fourteenth Amendment has been decided by this Court, and the Petition concedes as much. (Pet., p. 6) "[I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are *not picked up by the due process clause of the Fourteenth Amendment so as to become limitations on the states.*" *Fay v. New York*, 332 U.S. 261, 288 (1946) (emphasis added); *see also Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

In fact, this Court has held that the right to a jury trial "may be modified by a state or abolished altogether." *Palko v. Connecticut*, 302 U.S. 319, 324 (1937). The

Court has long been consistent and unwavering in its position on this issue.

The Petition does not bring to this Court any reasons to change the rule. It asserts that recent decisions by this Court evidence a "reinvigoration" of the Seventh Amendment's right to a jury trial. But none of the decisions discussed has anything to do with application of this right to the states.

Two of the cases involve classification of a claim brought to enforce a federal statute as either arising in law or equity. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987). In both *Granfinanciera* and *Tull*, the lower courts held that actions to recover fraudulent conveyances in a bankruptcy proceeding and to impose civil penalties under the Clean Water Act were equitable in nature, and thus there was no right to jury trial. The Supreme Court reversed, finding that these actions were analogous to 18th-century actions within the jurisdiction of the English law courts. Petitioners, therefore, had a right to a jury trial under the Seventh Amendment. In *Lytle v. Household Manufacturing*, 494 U.S. 545 (1990), the Court held that the petitioner's claim under which he was entitled to a jury trial had been erroneously dismissed by the trial court, and the court's findings as to the equitable claims did not collaterally estop the petitioner from trying his legal claims to a jury.

Nowhere in these cases does the Court address application of the Seventh Amendment to the states. Nowhere is there discussion of anything but federal rights under federal law in the federal courts. Nor is there even an

inkling that the Court wants to reconsider its early decisions and impose upon the states the federal right to a jury trial by incorporating the Seventh Amendment into the due process clause of the Fourteenth Amendment.

The law on this issue is clear. Deprivation of a jury trial on Mockett's legal claims in the state court does not give rise to a violation of due process under the Fourteenth Amendment. There is no issue remaining to be decided by this Court. Period.

CONCLUSION

The issues in this case do not even begin to give rise to a federal, much less a constitutional question. The issues presented and considered below present only state law issues. The Seventh Amendment question Mockett now seeks to open (but has not preserved) has been well-settled for decades and nothing this Court has written demonstrates an inclination or need to upset that precedent.

In the end, Mockett quarrels with the California Court of Appeal's construction of California law. That is a California matter. With respect, it is not the sort of thing

with which this Court needs to concern itself or for which this Court's jurisdiction was created.

Respondent prays that the Petition be denied.

Dated: October 21, 1997

Respectfully Submitted,

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